

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROY CALVIN TISDALE,

Plaintiff,

vs.

S. PARASCONDO,

Defendant.

3:08-cv-00513-RCJ (RAM)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

Before the court is Defendant's Motion to Dismiss. (Doc. #17.)¹ Plaintiff has opposed (Doc. #22), and Defendant has replied (Doc. #25). After a thorough review, the court recommends that the motion be granted.

I. BACKGROUND

Plaintiff, a *pro se* litigant in custody of the Nevada Department of Corrections, brings this action pursuant to 42 U.S.C. § 1983. At all relevant times, Plaintiff has been an inmate at either the Clark County Detention Center (CCDC) or the Southern Desert Correctional Center (SDCC). (Pl.'s Amend. Compl. 1 (Doc. #7).) Defendant is a metropolitan police officer. (*Id.* at 2.) Plaintiff seeks compensatory, future and punitive damages against Defendant. (*Id.* at 9.)

¹ Refers to the court's docket number.

1 In Count I, Plaintiff alleges that Defendant violated his rights secured by the Eighth
2 Amendment by acting with deliberate indifference towards his serious medical needs. (*Id.* at
3 4-5.)

4 In Count II, Plaintiff claims that Defendant violated his Eighth Amendment rights by
5 using excessive force. (*Id.*)

6 Defendant moves to dismiss because Plaintiff has failed to file within the statute of
7 limitations. (Def.'s Mot. to Dismiss 1, 3-4 (Doc. #17).)

8 **II. LEGAL STANDARD**

9 "A dismissal under Fed.R.Civ.P. 12(b)(6) is essentially a ruling on a question of law."
10 *North Star Int'l v. Ariz. Corp. Comm.*, 720 F.2d 578, 580 (9th Cir. 1983) (citation omitted).
11 At minimum, a plaintiff should state "enough facts to state a claim to relief that is plausible on
12 its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not
13 contain detailed factual allegations, but it must contain more than "a formulaic recitation of
14 the elements of a cause of action." *Id.* at 555. The Rule 8(a) notice pleading standard requires
15 the plaintiff to "give the defendant fair notice of what the . . . claim is and the grounds upon
16 which it rests." *Id.* at 1964 (internal quotations and citation omitted). The "plausibility
17 standard" does not impose a "probability requirement," rather, it requires a complaint to
18 contain "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v.*
19 *Iqbal*, 129 S.Ct. 1937, 1949 (2009). "Where a complaint pleads facts that are merely consistent
20 with a defendant's liability, it stops short of the line between possibility and plausibility of
21 entitlement to relief." *Id.*

22 In considering a motion to dismiss for failure to state a claim upon which relief may be
23 granted, all material allegations in the complaint are accepted as true and are to be construed
24 in a light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,
25 337-38 (9th Cir. 1996) (citation omitted). However, this tenet is "inapplicable to legal
26 conclusions." *Iqbal*, 129 S.Ct. at 1949. "Threadbare recitals of the elements of a cause of
27 action, supported by mere conclusory statements, do not suffice." *Id.* "While legal conclusions
28

1 can provide the framework of a complaint, they must be supported by factual allegations.” *Id.*
2 at 1950. Additionally, “only a complaint that states a plausible claim for relief survives a
3 motion to dismiss.” *Id.* A court should assume the veracity of well-pleaded factual allegations
4 and “then determine whether they plausibly give rise to an entitlement to relief.” *Id.* “[W]here
5 the well-pleaded facts do not permit the court to infer more than the mere possibility of
6 misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to
7 relief.” *Id.* (citations, brackets, and quotation omitted). Thus, a complaint may be dismissed
8 as a matter of law for “(1) lack of a cognizable legal theory or (2) insufficient facts under a
9 cognizable legal claim.” *Smilecare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 783 (9th
10 Cir 1996) (quoting *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.
11 1984)).

12 **III. DISCUSSION**

13 Defendant argues that Plaintiff’s claims arising out of Defendant’s actions on March 8,
14 2005, are barred by the applicable two-year statute of limitations. (Def.’s Mot. to Dismiss 3.)
15 Plaintiff contends that his claims are not barred because he filed his “original complaint” in
16 state court prior to the statute of limitations deadline. (Pl.’s Opp’n 1 (Doc. #22).)

17 Section 1983 does not contain its own statute of limitations. Therefore, the federal
18 courts borrow the statute of limitations for § 1983 claims applicable to personal injury claims
19 in the forum state. *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985). The applicable statute of
20 limitations for § 1983 actions brought in Nevada is two years. Nev. Rev. Stat. § 11.190(4)(e);
21 *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989). Federal law determines when a cause of
22 action accrues; a federal claim accrues when the plaintiff knows or has reason to know of the
23 injury which is the basis of the action. *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760
24 (9th Cir. 1991).

25 Under Nevada law, several circumstances prevent the statute of limitations from
26 running. Nev. Rev. Stat. § 11.250. Specifically, the statute will not run if a person is under the
27 age of 18 years, insane, or in the custodial care of the State beginning before the age of 18,

1 except when the person is imprisoned, paroled or on probation. Nev. Rev. Stat. § 11.250(1)-(3).

2 Plaintiff had two years from the acts allegedly caused by Defendant within which to
3 commence his section 1983 claims. *See* Nev. Rev. Stat. § 11.190(4)(e). An action is deemed to
4 be commenced when the complaint is filed. Fed. R. Civ. P. 3. Here, Plaintiff's initial complaint,
5 in federal court, was filed on September 19, 2008. (Doc. #1.) Plaintiff's complaint contains
6 allegations surrounding an incident on March 8, 2005, which is more than two years before
7 Plaintiff filed his complaint. Thus, Plaintiff's complaint was filed beyond the statute of
8 limitations. Plaintiff appears to argue that a complaint he filed in state court in another case
9 precludes the statute of limitations from running in this case. (Pl.'s Opp'n 1.) As established
10 above, Nevada does not toll the statute of limitation during other judicial proceedings. Because
11 Plaintiff's circumstances do not allow the statute to be tolled, Plaintiff's complaint in this case
12 is untimely. Therefore, the March 8, 2005 incident is barred by the statute of limitations.

13 **IV. RECOMMENDATION**

14 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order
15 **GRANTING** Defendant's Motion to Dismiss (Doc. #17) with prejudice.

16 **IT IS FURTHER RECOMMENDED** that the District Judge enter an Order
17 **DENYING AS MOOT** Plaintiff's Motion for Sanctions and Hearing (Doc. #23).

18 The parties should be aware of the following:

19 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the
20 Local Rules of Practice, specific written objections to this Report and Recommendation within
21 fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate
22 Judge's Report and Recommendation" and should be accompanied by points and authorities
23 for consideration by the District Court.

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DATED: June 2, 2010.

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UNITED STATES MAGISTRATE JUDGE